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Judicial Modesty and Abortion

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JUDICIAL MODESTY AND ABORTION

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I. INTRODUCTION

During his confirmation hearings before the United States Senate Judiciary Committee, then-Judge John Roberts testified that he wanted to be a "modest" judge.[1] By this, he appears to have meant a judge who strives to interpret the law as the lawmakers intended and to provide judicial answers to only the questions necessary to resolve the case before the court.[2] The purpose of this Article is to consider the implications of this conception of "judicial modesty" for the constitutional jurisprudence of abortion.

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1. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 158 (2005) [hereinafter *Roberts Confirmation Hearing*] (statement of John G. Roberts, Jr., Nominee, Chief Justice of the United States).

2. Michael J. Gerhardt described the history of the concept of "judicial modesty" in his Robert S. Marx Lecture at the University of Cincinnati on February 29, 2007. *See* Michael J. Gerhardt, *Constitutional Humility*, 76 U. CIN. L. REV. 23 (2007).

Part II of this Article will consider whether the Constitution—by its terms, historical understanding, or previous judicial interpretation—required the Court to constitutionalize questions related to abortion. My conclusions compel me to join the legions of legal scholars who have sharply criticized the reasoning employed by the Court in *Roe v. Wade*.[3] Part III attempts to determine whether the Court expanded or limited the impact of *Roe*'s flawed reasoning in its abortion cases between *Roe* and Chief Justice Robert's confirmation. The evidence largely

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3. 410 U.S. 113 (1973). It is important to note that these critics include many scholars who applaud the outcome of *Roe*, yet are compelled as a matter of academic integrity to admit that the case is largely unprincipled in its use of legal precedent and reasoning. This is the underlying premise of the authors writing in support of *Roe*'s outcome in *What* Roe v. Wade *Should Have Said* (Jack Balkin ed., 2005). Serious criticism of *Roe* began almost as soon as the Court announced the decision and has continued through today. *See, e.g.*, ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 27 (1975) ("But if the Court's model statute [on abortion] is generally intelligent, what is the justification for its imposition? If this statute, why not one on proper grounds of divorce, or on adoption of children?"); MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 1 (1982) ("[*Roe*] cannot be explained by reference to any value judgment constitutionalized by the framers."); CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 83 (2005) ("Exemplifying perfectionism at its most extreme, [the *Roe* decision] raised grave doubts about the Court's use of the Constitution to solve divisive social controversies."); Robert M. Bryn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807, 813–57 (1973) (detailing the "errors" contained in the *Roe* decision and concluding that "[b]eneath the surface [of the opinion], there is little that is not error"); Erwin Chemerinsky, *Rationalizing the Abortion Debate: Legal Rhetoric and the Abortion Controversy*, 31 BUFF. L. REV. 107 (1982) (reviewing major criticisms of the *Roe* decision advanced in legal journals); Joseph W. Dellapenna, *Nor Piety nor Wit: The Supreme Court on Abortion*, 6 COLUM. HUM. RTS. L. REV. 379, 384 (1974) ("The [*Roe*] opinion is reple[te] with irrelevancies, non-sequiturs, and unsubstantiated assertions. The Court decides matters it disavows any intention of deciding—thereby avoiding any need to defend its conclusions. In the process the opinion simply fails to convince."); Robert A. Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CAL. L. REV. 1250 (1975) (examining the *Roe* decision and concluding that the Court's reasoning lacks legal, historical, scientific, and philosophical support); John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 943 (1973) ("The problem with *Roe* is not so much that it bungles the question it sets itself, but rather that it sets itself a question the Constitution has not made the Court's business." (footnote omitted)); William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1312–13 (2005) (characterizing *Roe* as a "premature" decision by the Supreme Court); Clarke D. Forsythe & Stephen B. Presser, *The Tragic Failure of* Roe v. Wade*: Why Abortion Should Be Returned to the States*, 10 TEX. REV. L. & POL. 85, 89 (2005) ("[T]he Court's original decisions in *Roe* and *Doe* [*v. Bolton*] were unconstitutional usurpations of self-government, with no legitimate basis in substantive due process or constitutional law."); Gerald Gunther, *Some Reflections on the Judicial Role: Distinctions, Roots, and Prospects*, 1979 WASH. U. L. REV. 817, 819 ("I have not yet found a satisfying rationale to justify *Roe v. Wade* . . . on the basis of modes of constitutional interpretation I consider legitimate." (footnote omitted)); Charles E. Rice, *The Dred Scott Case of the Twentieth Century*, 10 HOUS. L. REV. 1059, 1067 (1973) (declaring the *Roe* decision "erroneous in terms of logic and constitutional intent"); Lynn D. Wardle, *Rethinking* Roe v. Wade, 1985 BYU L. REV. 231 (1985) (arguing that the Supreme Court should reconsider the *Roe* decision); John T. Noonan, Jr., *The Right to Life: Raw Judicial Power*, 25 NAT'L REV. 260, 264 (1973) (calling for a constitutional amendment reversing *Roe*). Prior to ascending to the bench of the Supreme Court, one of the Court's most fierce defenders of a constitutional right to abortion expressed dissatisfaction with the reasoning of *Roe*. *See* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 376 (1985) ("*Roe v. Wade* sparked public opposition and academic criticism . . . because the Court ventured too far in the change it ordered and presented an incomplete justification for its action." (footnote omitted)); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1208 (1992) ("*Roe* . . . halted a political process that was moving in a reform direction and thereby . . . prolonged divisiveness and deferred stable settlement of the issue.").

supports the conclusion that the Court expanded its flawed reasoning, reaching new heights of judicial hubris in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[4] and new lows in its indifference to the evidentiary record in *Stenberg v. Carhart*.[5]

Part IV then carefully examines *Ayotte v. Planned Parenthood of Northern New England*[6] and *Gonzales v. Carhart*.[7] These are the only two decisions on abortion that the Court has issued since Chief Justice Roberts assumed leadership of the Court. These cases appear to foreshadow greater judicial restraint when reviewing abortion-related legislation, and thus greater freedom for the people and their elected representatives to decide the proper limits of the state's interest in protecting women and the unborn life they carry within them.

Part V briefly speculates about the impact of a judicially modest approach in shaping future abortion jurisprudence. Specifically, Part V predicts fewer successful facial challenges to abortion regulations; greater emphasis on the requirements of constitutional and prudential standing; skepticism regarding claims of third-party representation; and careful review of the evidentiary record offered to support assertions that contested abortion regulations unduly burden women's liberty when seeking abortions. Contrary to claims made in abortion activists' hysterical denunciations of *Gonzales*[8]—the Court's decision upholding the Federal Partial-Birth Abortion Act of 2003[9]—Part VI concludes that a judicially modest approach is unlikely to result in the overruling of *Roe v. Wade* within the foreseeable future.

II. IS ABORTION A CONSTITUTIONAL ISSUE?

Clearly, neither the text of the Constitution nor any of its amendments explicitly address the question of abortion.[10] Nor is there a textual "right to

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4. 505 U.S. 833 (1992) (plurality).

5. 530 U.S. 914 (2000).

6. 546 U.S. 320 (2006).

7. 127 S. Ct. 1610 (2007).

8. *See, e.g.*, Alexi A. Wright & Ingrid T. Katz, Roe *Versus Reality: Abortion and Women's Health*, 355 N.E. J. MED. 1, 9 (2006), *available at* http://content.nejm.org/cgi/content/full/355/1/1 ("[P]oor women in rural America are bearing the brunt of these decisions, and some may pay with their lives."); Robert Barnes, *High Court Upholds Curb on Abortion*, WASH. POST, Apr. 19, 2007, at A1 (quoting Nancy Northrup, president of the Center for Reproductive Rights, who characterized the opinion as "'overturn[ing] three decades of established constitutional law'"); Marie Horrigan, *Reaction to Court's Abortion Ruling Falls Along Predictable Party Lines*, CONG. Q., Apr. 18, 2007, *available at* http://www.nytimes.com/cq/2007/04/18/cq_2588.html (quoting Ellen R. Malcolm, president of EMILY's List—an organization dedicated to electing Democratic women candidates who favor abortion rights—who stated the following: "[The] Bush administration and his court appointees have so whittled away at the basic reproductive rights of women that Roe is hanging by a thread." (emphasis added) (internal quotation marks omitted)); Lynn Harris, *Supreme Court Upholds Ban on "Partial-Birth" Abortion*, SALON.COM, Apr. 19, 2007, http://www.salon.com/mwt/feature/2007/04/19/scotus_ban/print.html (quoting Eve Gartner, attorney for Planned Parenthood Federation of America, as predicting, "[T]he [C]ourt in not too long will probably be forced to consider the question of whether [*Roe*] is the law of the land.").

9. *See Gonzales*, 127 S. Ct. at 1627, 1632.

10. This could change if the advocates of the "Human Life Amendment" were to succeed in enacting a constitutional amendment. *See, e.g.*, Francis J. Beckwith, *Disagreement Without Debate: The Republican Party Platform and the Human Life Amendment*, 4 NEXUS 113 (1999) (discussing the various attempts at "human life amendments" to the Constitution); James Bopp, Jr., *An Examination*

privacy"—the foundation of the judicially-created right to abortion.[11] The *Roe* majority forthrightly acknowledged this fact in its opinion by stating, "The Constitution does not explicitly mention any right of privacy."[12]

A. Roe*'s Historical Justification*

Finding no warrant in the text of the Constitution to overrule the abortion laws of forty-six states,[13] the *Roe* majority turned to the history of abortion: "[W]e have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortion procedure over the centuries."[14] More than half of the majority opinion is devoted to a selective review of ancient and common law beliefs about abortion.[15] In the paragraph devoted to "[a]ncient attitudes," Justice Blackmun, writing for the majority, notes that the views of the ancients on abortion "are not capable of precise determination."[16] Nonetheless, he concludes the following: "Greek and Roman law afforded little protection to the unborn. If abortion was prosecuted in some places, it seems to have been based on a concept of a violation of the father's right to his offspring."[17]

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of Proposals for a Human Life Amendment, 15 CAP. U. L. REV. 417, 447 (1986) ("The [Hatch-Eagleton Amendment] is intended to preclude reliance upon any provision of the Constitution as authority for recognition of [a right to abortion], whatever its alleged constitutional basis." (citations omitted)); Paolo Torzilli, Note, *Reconciling the Sanctity of Human Life, the Declaration of Independence, and the Constitution*, 40 CATH. LAW. 197, 224–25 (2000) (listing a constitutional amendment as one option to "help preserve the right to life for the unborn"). For an outline of post-*Roe* efforts to pass a human life amendment, see NAT'L COMM. FOR A HUMAN LIFE AMENDMENT, HUMAN LIFE AMENDMENT HIGHLIGHTS: UNITED STATES CONGRESS (1973–2003) (2004), http://www.nchla.org/datasource/idocuments/HLAhghlts.pdf.

11. *See* Roe v. Wade, 410 U.S. 113, 153 (1973).

12. *Id.* at 152; *see also* Christopher L. Eisgruber, *The Fourteenth Amendment's Constitution*, 69 S. CAL. L. REV. 47, 95 (1995) ("*Roe* exemplifies the interpretive distortions that result when the political theoretic concepts of the Fourteenth Amendment become submerged beneath technical stratagems arguably well suited to legal competence but askew from constitutional ideals.").

13. *See* JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY 697 (2006) (citing *Roe*, 410 U.S. at 118 n.2); Forsythe & Presser, *supra* note 3, at 94 ("As of January 1973, thirty-one states permitted no exception other than to save the life of the mother, and most states actively enforced their abortion laws.").

14. *Roe*, 410 U.S. at 116–17. The historical recitation in *Roe* has been characterized as "sophomoric." *See* Richard A. Posner, *Judges' Writing Style (and Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1434–35 (1995).

15. Joseph W. Dellapenna, *Abortion and the Law: Blackmun's Distortion of the Historical Record*, *in* ABORTION AND THE CONSTITUTION: REVERSING *ROE V. WADE* THROUGH THE COURTS 137, 138 (Dennis J. Horan et al. eds., 1987) (citing *Roe*, 410 U.S. at 129–52, 156–62); *see also* Robert F. Nagel, *Political Pressure and Judging in Constitutional Cases*, 61 U. COLO. L. REV. 685, 691 (1990) ("I count some twenty-three pages of [medical ethics and philosophy in the *Roe* opinion] before the Constitution is again mentioned (and then only to concede that its text does not mention a right to privacy)." (citing *Roe*, 410 U.S. at 152)).

16. *Roe*, 410 U.S. at 130.

17. *Id.* It is impossible to reject the conclusion that "Roman law afforded little protection to the unborn." *Id.* As has been noted by many scholars, Roman law allowed infanticide through the exposure of unwanted infants. *See, e.g.*, CHARLES J. REID JR., POWER OVER THE BODY, EQUALITY IN THE FAMILY: RIGHTS AND DOMESTIC RELATIONS IN MEDIEVAL CANON LAW 70 (2004) ("Paternal power conferred on the head of household the power of life and death (*vitae necisque potestas*) over those under his authority. . . . The power of life and death was exerted in a different context as well—the exposure by

Turning to the Hippocratic Oath, and relying almost exclusively upon a single scholarly work,[18] Justice Blackmun found that the Oath's prohibition of giving a woman a pessary to produce abortion "represent[s] only a small segment of Greek opinion [at that time] and that it certainly was not accepted by all ancient physicians."[19] In spite of his observations that the Oath "represents the apex of the development of strict ethical concepts in medicine, and its influence endures to this day,"[20] Justice Blackmun provided no analysis of the Oath's influence on physicians throughout the Western world during medieval and modern times. This omission is particularly striking in light of Justice Blackmun's apparent determination to rebut the Oath in *Roe*.[21]

After its analysis of the Hippocratic Oath, the majority opinion then recounted what it represented as a history of the common law's treatment of abortion.[22] While citing multiple sources, Justice Blackmun's evidence, interpretation, and reasoning closely follow the history of abortion as interpreted by the president and co-founders of the National Association for Reform of Abortion Laws[23]—Lawrence Lader[24]—and the organization's legal counsel—Cyril Means, Jr.[25] In this

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parents of unwanted children, usually infants."). For a detailed account of abortion in ancient Rome and Greece, see generally KONSTANTINOS KAPPARIS, ABORTION IN THE ANCIENT WORLD (2002).

18. In his opinion, Justice Blackmun appears to uncritically embrace the views expressed by Professor Ludwig Edelstein in his monograph, THE HIPPOCRATIC OATH (1943). *See Roe*, 410 U.S. at 130–32. This is a rather slender reed upon which to rest the conclusion that the Hippocratic Oath's provisions on abortion were largely irrelevant to medical practice in ancient times. *See* Martin Arbagi, Roe *and the Hippocratic Oath*, *in* ABORTION AND THE CONSTITUTION: REVERSING *ROE V. WADE* THROUGH THE COURTS, *supra* note 15, at 159 (criticizing the *Roe* Court's reliance on Professor Edelstein's interpretation of the Hippocratic Oath); John M. Dolan, *Is Physician-Assisted Suicide Possible?*, 35 DUQ. L. REV. 355, 383 (1996) ("It is interesting to note that Edelstein's defective translation is the one quoted by Blackmun in his *Roe* opinion. Even more significant is the fact that Edelstein's unsound remarks about the status of the Oath are also quoted with respect by Blackmun."); Lisa R. Hasday, *The Hippocratic Oath as Literary Text: A Dialogue Between Law and Medicine*, 2 YALE J. HEALTH POL'Y L. & ETHICS 299, 306–12 (2002) (examining the *Roe* Court's discussion of the Hippocratic Oath).

19. *Roe*, 410 U.S. at 132 (citing EDELSTEIN, *supra* note 18, at 63).

20. *Id.* at 131. As noted in *Roe*, not one of the principal briefs in the case mentioned the Oath. *Id.* Moreover, counsel for the plaintiffs was not even prepared to address the Oath during oral argument. *See* Nan D. Hunter, *Justice Blackmun, Abortion, and the Myth of Medical Independence*, 72 BROOK. L. REV. 147, 177–78 (2006).

21. Professor Gregory Sisk notes that Justice Blackmun subsequently seemed uninterested in discussing any aspect of *Roe* other than his treatment of the Hippocratic Oath. *See* Gregory C. Sisk, *The Willful Judging of Harry Blackmun*, 70 MO. L. REV. 1049, 1055 (2005).

22. *See Roe*, 410 U.S. at 132–36.

23. The National Association for Reform of Abortion Laws was subsequently renamed the National Abortion Rights Action League in 1973 and in 2003 adopted its current name—NARAL Pro-Choice America. NARAL PRO-CHOICE AMERICA, HISTORY OF NARAL PRO-CHOICE AMERICA, http://www.prochoiceamerica.org/assets/files/About-NARAL-history.pdf (last visited May 29, 2008).

24. Mr. Lader described his attempts to legalize abortion through "confrontation politics" as "a crude, inflammatory approach, but the only way to shake the country." LAWRENCE LADER, ABORTION II: MAKING THE REVOLUTION 16 (1973). Lader continued to be active in promoting abortion until his death on May 7, 2006. *See* Patricia Sullivan, *Lawrence Lader, 86; Crucial Voice of Abortion Rights Vanguard*, WASH. POST, May 11, 2006, at B6.

25. *See* DELLAPENNA, *supra* note 13 at 13–18 (2006) (discussing Cyril Means's influence in shaping what the *Roe* Court propounded as the history of abortion); Joseph W. Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. PITT. L. REV. 359, 363–65 (1979) [hereinafter Dellapenna, *The History of Abortion*] (same).

bowdlerized account of the common law, abortion was only a crime after "quickening"—when the mother could feel movement by the unborn child—or "animation"—when the unborn child was infused with a soul.[26] In this account, subsequent development of English law became more and more liberal as more was learned about pregnancy. While English law originally classified abortion as a felony,[27] it subsequently rejected punishment of any doctor who performed an abortion to prevent "a serious and permanent threat to the mother's health."[28] When even this restraint proved too restrictive, Parliament enacted the Abortion Act of 1967, which permits a physician "to terminate a pregnancy where he is of the good-faith opinion that the abortion 'is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman.'"[29] Yet, a review of early English cases and authors—such as Lord Bracton and Sir Edward Coke (both of whom are cited by Justice Blackmun)[30]—establishes

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26. *See Roe*, 410 U.S. at 132–36 ("The significance of quickening was echoed by later common-law scholars and found its way into the received common law in this country."). Scholars have roundly criticized the *Roe* Court's discussion of the medieval treatment of abortion. *See, e.g.*, DELLAPENNA, *supra* note 13, at 126 ("[T]he Court largely got the history wrong, basing its views upon and contributing to a new orthodoxy on abortion history that forms a set of myths that are coherent with each other but are utterly false to the historical record as it has come down to us."); Bryn, *supra* note 3, at 814–39 (summarizing the historical errors found in the *Roe* opinion); John R. Connery, *The Ancients and the Medievals on Abortion: The Consensus the Court Ignored*, *in* ABORTION AND THE CONSTITUTION: REVERSING *ROE V. WADE* THROUGH THE COURTS, *supra* note 15, at 123 ("The Court's version of history is so defective that it serves no useful purpose and the accurate account, far from validating the position of the Court, offers a very convincing argument against it.").

27. *See Roe*, 410 U.S. at 136–37.

28. *See id.* at 137 (citing Rex v. Bourne, [1939] 1 K.B. 687). This was the product of a ruling in *Rex v. Bourne*, [1939] 1 K.B. 687, which involved the prosecution of a doctor who aborted a teen's pregnancy that had resulted from gang rape. *See id.* One commentator noted the following regarding *Bourne*'s impact on the law governing abortion:

> Even though the ruling from the bench in Bourne's favor was merely a jury instruction at an Old Bailey trial, the case received wide publicity and the decision was widely cited as settling the matter in England and elsewhere in the Empire. The *Bourne* case was even followed by at least one court in the United States. The result in *Bourne* considerably liberalized the interpretation of England's abortion statute, even beyond the reforms proposed to Parliament and not enacted. While *Bourne* made prosecutions for abortion more difficult, the decision was sufficiently narrow that physicians would still need to worry about the possibility of a prosecution if they performed an abortion in less sympathetic circumstances. The luck of the draw in impaneling a jury would determine whether they were convicted. This concern could deter abortions by many physicians even if they were personally supportive of a liberalized approach to abortion.

DELLAPENNA, *supra* note 13, at 531 (footnotes omitted).

29. *Roe*, 410 U.S. at 138 (quoting Abortion Act of 1967, 15 & 16 Eliz. 2, c. 87, § 1(4)). Notwithstanding the liberality of English law under *Bourne*, the "mental health" exception became the primary justification for abortion. One commentator has noted,

> Nearly all legal abortions in England and Wales after 1967 were justified by risks to the mental health or the social situation of the woman. In 1990, nearly all abortions performed [on] English and Welsh women (98.4 percent) were justified by social indications, with even more of the abortions of foreign women (99.85 percent) being justified by social indications. . . . Because genuine risks to a woman's physical health are extremely rare, such threats hardly appear in the records of abortions in England.

DELLAPENNA, *supra* note 13, at 582 (footnotes omitted).

30. *See Roe*, 410 U.S. at 134–36 (citations omitted).

that "killing a child in the womb of its mother" was always considered a crime.[31] However, proving the commission of such a crime, especially before the woman had felt the child move, was enormously difficult in light of then-existing medical knowledge.[32]

The historical license taken by Justice Blackmun in his description of the English common and statutory law is trivial, however, when compared with the selective treatment American law received in *Roe*'s historical account of abortion.[33] Justice Blackmun summarized the American history as follows:

> It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy.[34]

A comprehensive review of the history of American abortion law reveals the exact opposite—American law followed English precedent in punishing abortion as a crime, but only when the state could prove that the woman was pregnant at the time of the alleged criminal act. American and early-English law consistently treated abortion with strong disfavor: "The tradition of treating abortion as a crime was unbroken through nearly 800 years of English and American history until the reform movement of the later twentieth century."[35] However, an equally strong

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31. Cyril C. Means, Jr., *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335, 339 (1971) (reporting a translation of Y.B. Mich. 22 Edw. 3 (1348), which Professor Means refers to as "*The Abortionist's Case*").

32. *See* Bryn, *supra* note 3, at 816–27 (providing examples of common law abortion prosecutions that exemplify the difficulty in proving the requisite criminal act); Clarke D. Forsythe, *The Effective Enforcement of Abortion Law Before* Roe v. Wade, *in* THE SILENT SUBJECT: REFLECTIONS ON THE UNBORN IN AMERICAN CULTURE 179, 183 (Brad Stetson ed., 1996) ("[T]he American colonies imported the English common law against abortion and enforced it, to the extent possible given primitive medical science."); Gregory J. Roden, Roe v. Wade *and the Common Law: Denying the Blessings of Liberty to Our Posterity*, 35 UWLA L. REV. 212, 219–40 (2003) (same).

33. *See Roe*, 410 U.S. at 138–41.

34. *Roe*, 410 U.S. at 140–41.

35. DELLAPENNA, *supra* note 13, at xii (internal quotation marks omitted); *see also* JOHN KEOWN, ABORTION, DOCTORS AND THE LAW (1988) (analyzing abortion regulation from 1200 to 1988); MARVIN OLASKY, ABORTION RITES: A SOCIAL HISTORY OF ABORTION IN AMERICA (Regnery Publ'g, Inc. 1995) (providing a detailed history of abortion in America); Dellapenna, *The History of Abortion*, *supra* note 25, at 365–416 (examining the "Four Phases of the Law Governing Abortion in Anglo-American Law"); Forsythe, *supra* note 32, at 183 ("[T]he American colonies imported the English common law against abortion and enforced it, to the extent possible given primitive medical science. Common law abortion cases have been discovered in a number of American colonies."); James S. Witherspoon, *Reexamining* Roe*: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY'S L.J. 29 (1985) (examining American abortion laws in effect during the 1800s).

Anglo-American tradition required a strong factual basis for the conclusion that an abortion had been committed before imposing criminal penalties.[36]

In short, *Roe*'s historical account of American abortion regulation mischaracterizes prosecutors' proper reluctance to pursue cases without adequate evidence of pregnancy as a recognition of a woman's right to terminate a pregnancy. The magnitude of this misreading of history suggests Justice Blackmun confused the role of a dispassionate jurist with that of a partisan advocate of abortion.[37]

B. Roe*'s Claim of Implicit Unconstitutionality*

Ultimately, Justice Blackmun grounded the right to abortion in prior judicial interpretations of the Constitution that recognized a right to privacy.[38] Equating interpretations of explicit constitutional provisions that protect the privacy of the

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36. *See* Bryn, *supra* note 3, at 817–25; Dellapenna, *The History of Abortion*, *supra* note 25, at 369–71.

37. A review of Justice Blackmun's papers suggests that his personal commitment to abortion rights increased during his tenure on the Court.

> Based on my work in the Blackmun papers, I have suggested that his post-1973 development was an example of path dependence: that being vilified by one side of the abortion debate and lionized by the other in the aftermath of *Roe v. Wade* led him to become more and more entrenched in his defense of *Roe*. As a result, he eventually came to embrace a unified jurisprudence of women's rights and abortion rights that was almost completely foreign to the medical model of abortion with which he began. Blackmun was a brooder who took things personally. It is hard to imagine Justice William Brennan sitting in his chambers at night reading through the tens of thousands of pieces of hate mail that poured into the Blackmun chambers. Blackmun read all those letters and saved them all; in their way, they helped make him the Justice he became.

Linda Greenhouse, *Justices Who Change: A Response to Epstein et al.*, 101 NW. U. L. REV. 1885, 1886–87 (2007) (footnotes omitted). Another commentator noted,

> With the release of Justice Blackmun's personal papers, we have learned more about how *Roe* proceeded in a straight line from his previous personal opinions about abortion, about how he appealed to and perceived other members of the Court through the lens of his political stance on the controversial question, and about how *Roe* radicalized a previously moderate jurist into a willful judge ready and willing to impose his view of the preferred answer to controversial political, social, and moral questions into a constitutional mandate.

Sisk, *supra* note 21, at 1055–56. Justice Blackmun described his reaction to the letters of citizens regarding his opinion in *Roe* during an interview with Professor Harold Koh. *Blackmun Reflects on 'Roe v. Wade,'* (National Public Radio broadcast Mar. 5, 2004), *available at* http://www.npr.org/templates/dmg/dmg.php?mediaURL=/atc/20040305_atc_blackmunroefinal&NPRMediaPref=WM. For a discussion of how the series of interviews with Justice Blackmun came about, see generally Harold Hongju Koh, *Unveiling Justice Blackmun*, 72 BROOK. L. REV. 9 (2006).

38. *See Roe*, 410 U.S. at 152–53.

home and of criminal defendants[39] to the judicially-created right to use and sell contraception,[40] the *Roe* majority found the following:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[41]

As one prominent scholar of constitutional law has observed, "*Roe* simply stringcites a series of privacy cases involving marriage, procreation, contraception, bedroom reading, education, and other assorted topics, and then abruptly announces with no doctrinal analysis that this privacy right 'is broad enough to encompass' abortion. *Ipse dixit*."[42] The Court's inability to definitively identify the constitutional text or historical interpretation that required the overturning of forty-six states' abortion laws[43] evidences the vacuous nature of *Roe*'s analysis.

The Court rejected any claim of constitutional status on behalf of the unborn child as unsupported by the text of the Constitution.[44] According to Justice

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39. In the 1960s, the Supreme Court gave the term *privacy* a central role in the interpretation of the Third and Fourth Amendments. *See, e.g.*, *Terry v. Ohio*, 392 U.S. 1, 8–9 (1968) (stating that the Fourth Amendment protects areas in which one has a reasonable expectation of privacy from unreasonable searches and seizures); Katz v. United States, 389 U.S. 347, 350 n.5 (1967) ("The Third Amendment's prohibition against the unconsented peacetime quartering of soldiers protects another aspect of privacy from governmental intrusion.").

40. *See* Eisenstadt v. Baird, 405 U.S. 438, 452–55 (1972); Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965).

41. *Roe*, 410 U.S. at 153.

42. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 778 (1999) (footnote omitted) (quoting *Roe*, 410 U.S. at 153).

43. *See* DELLAPENNA, *supra* note 13, at 697.

44. *See Roe*, 410 U.S. at 156–57. The majority correctly identified the Constitution as addressing the rights of "citizens" or "persons," but limited those terms to human beings who survive birth. *See id.* at 157. Specifically, the Court noted,

> The Constitution does not define "person" in so many words. Section 1 of the Fourteenth Amendment contains three references to "person." The first, in defining "citizens," speaks of "persons born or naturalized in the United States." The word also appears both in the Due Process Clause and in the Equal Protection Clause. "Person" is used in other places in the Constitution: in the listing of qualifications for Representatives and Senators, Art. I, § 2, cl. 2, and § 3, cl. 3; in the Apportionment Clause, Art. I, § 2, cl. 3; in the Migration and Importation provision, Art. I, § 9, cl. 1; in the Emolument Clause, Art. I, § 9, cl. 8; in the Electors provisions, Art. II, § 1, cl. 2, and the superseded cl. 3; in the provision outlining qualifications for the office of President, Art. II, § 1, cl. 5; in the Extradition provisions, Art. IV, § 2, cl. 2, and the superseded Fugitive Slave Clause 3; and in the Fifth, Twelfth, and Twenty-second Amendments, as well as in §§ 2 and 3 of the Fourteenth Amendment. But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application.

Roe, 410 U.S. at 157 (footnotes omitted).

The Court has yet to explain how human beings within the womb fail to qualify as "persons" under the terms of the Constitution, while corporations and other artificial legal beings are constitutional "persons" for certain purposes. *See, e.g.*, Power Mfg. Co. v. Saunders, 274 U.S. 490, 495–97 (1927)

Blackmun, the Court's differing treatment of constitutional text is justified because no prior case had held "that a fetus is a person within the meaning of the Fourteenth Amendment."[45] The majority further opined that a contrary ruling would be inconsistent with the Texas law at issue in *Roe*, which allowed abortion for the purpose of saving the life of the mother.[46]

Careful examination of the development of Anglo-American law prior to *Roe* evidences increasing attempts to protect the life of the unborn child, which resulted from advancing medical knowledge about the nature of pregnancy and the characteristics of the unborn child.[47] Unlike their eighteenth-century counterparts, doctors and scientists in the nineteenth and twentieth centuries had sufficient scientific facts about pregnancy to conclude that the unborn child was a separate human being from the time of conception, and therefore worthy of legal protection.[48] The absence of an eighteenth-century case holding that the unborn child was a "constitutional person" is not surprising in light of the medical knowledge in existence at that time. The Court's reliance upon this absence is as foolish as a conclusion that the absence of a case holding that the Internet is a means of human communication removes the Internet from the free speech protections of the First Amendment.[49]

As for any possible inconsistency with the Texas law, it is difficult to predict what the Court's view would have been had it taken seriously Texas's claim of competing constitutional interests, notwithstanding Justice Blackmun's cavalier dismissal: "But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command?"[50] The constitutionality of a state's *failure* to protect the life of the unborn was not before the Court in *Roe*, and was unlikely to have arisen under the Texas statute at issue in the case.

If such a case had been presented to the Court in the early 1970s, it likely would have come from a court in Alaska, Hawaii, New York, or Washington, because these jurisdictions had eliminated virtually all restrictions on abortion

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(holding that a corporation is a constitutional person for purposes of the Equal Protection Clause). Professor Charles I. Lugosi explores this judicial deficiency in his article, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*, 22 ISSUES L. & MED. 119 (2007). One suspects that finding that the unborn child is a constitutional person would not have been difficult if the Court had employed the same level of creativity and ingenuity it showed in finding a right to abortion in the liberty clause of the Fourteenth Amendment, *see Roe*, 410 U.S. at 153, or the right to prescribe and use contraception emanating from the penumbras of the Bill of Rights, *see Griswold*, 381 U.S. at 484–86.

45. *Roe*, 410 U.S. at 157.

46. *Id.* at 157, n.54.

47. *See* Bryn, *supra* note 3, at 825–26.

48. *See* DELLAPENNA, *supra* note 13, at 257–61, 281–84 (discussing early attempts at legal protection of the unborn); Witherspoon, *supra* note 35, at 40–50, 61–69 (same). For an analysis of how contemporary medical discoveries regarding pregnancy and abortion may impact abortion jurisprudence, see generally Jason A. Adkins, Note, *Meet Me at the (*West Coast*) Hotel: The* Lochner *Era and the Demise of* Roe v. Wade, 90 MINN. L. REV. 500 (2005).

49. *Cf.* Reno v. ACLU, 521 U.S. 844, 885 (1997) (holding that free speech protections limited Federal Communications Decency Act provisions that sought to protect minors from harmful material on the Internet).

50. *Roe*, 410 U.S. at 158, n.54.

during the first half of pregnancy.[51] It is possible that an unborn child—through the father or other next friend—might have sought an injunction to stop the mother from obtaining an abortion, arguing that the state had a constitutional obligation to protect the child's life.[52] A court might have rejected such a claim by finding a lack of any state action[53] or by adopting a narrow procedural interpretation of the Due Process Clause of the Fourteenth Amendment.[54] A court might have answered any claim that the Equal Protection Clause was violated by omitting the unborn from laws protecting the life of infants and other born persons by denying that unborn children and born children are similarly situated due to the unborn child's physical location within the mother's body.[55] Or just maybe the Court would have found that the vulnerability of the unborn and the infant are sufficiently similar to require equal protection of both—at least in cases when the abortion is not necessary to protect the life of the mother[56]—and ordered that the injunction issue.

III. EXPANSION OF *ROE*'S FLAWED REASONING

In the nineteen years between the creation of a constitutional right to abortion in *Roe v. Wade*[57] and the reaffirmation of its constitutional status in *Planned*

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51. *See* Act of Apr. 30, 1970, ch. 103, 1970 Alaska Sess. Laws (codified as amended at ALASKA STAT. §§ 18.16.010–.090 (2006)); Act of Mar. 11, 1970, ch. 1, § 2, 1970 Haw. Sess. Laws 1 (codified at HAW. REV. STAT. ANN. § 453-16 (LexisNexis 2005)); Act of Apr. 11, 1970, ch. 127, 1960 N.Y. Sess. Laws 170 (codified at N.Y. PENAL LAW § 125.05(3) (McKinney 2004)); Act of Feb. 9, 1970, ch. 3, 1970 Wash. Sess. Laws 23 (codified as amended at WASH. REV. CODE ANN. §§ 9.02.100–.170 (West 2003)). For a comprehensive history of state abortion statutes enacted between 1967 and 1973, see generally Paul Benjamin Linton, *Enforcement of State Abortion Statutes After* Roe*: A State-by-State Analysis*, 67 U. DET. L. REV. 157 (1990).

52. *See, e.g.*, Byrn v. N.Y. City Health & Hosps. Corp., 286 N.E.2d 887, 890 (N.Y. 1972) (finding nonjusticiable the issue of whether an unborn child qualifies for legal personhood), *appeal dismissed*, 410 U.S. 949 (1973). Whether the Court would ever recognize the constitutional personhood of the unborn is the subject of a debate between Professor Nathan Schlueter and Judge Robert H. Bork in *Constitutional Persons: An Exchange on Abortion*, FIRST THINGS, Jan. 2003, at 28, *available at* http://www.firstthings.com/article.php3?id_article=424.

53. *See, e.g.*, DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 201–03 (1989) (rejecting liability arising under the Constitution for government officials' failure to protect children, even in cases where officials have notice that the children's lives are threatened).

54. *See, e.g.*, Conn. Dep't of Safety v. Doe, 538 U.S. 1, 8 (2003) (finding that a Connecticut law did not violate procedural due process under the Fourteenth Amendment).

55. *See, e.g.*, *In re* Marriage of Witten, 672 N.W.2d 768, 773–83 (Iowa 2003) (denying custody to genetic and intended mother of embryos for implantation, absent ex-husband's consent); A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000) (same); Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998) (same); Roman v. Roman, 193 S.W.3d 40 (Tex. App. 2006) (same); *cf.* Ferguson v. City of Charleston, 532 U.S. 67, 85–86 (2001) (holding that state hospital urine testing of pregnant patients to obtain evidence of cocaine use was an unreasonable search absent the patients' consent, even if the ultimate goal was to get pregnant women off drugs and into treatment).

56. *See* Teresa Collett, *The Courts' Confused (and Confusing) Understanding of the Creation and Taking of Human Life*, 68 MONT. L. REV. 265, 279–82 (2007) (discussing the law governing the killing of nonaggressors in order to preserve life); *cf.* Miller v. HCA, Inc., 118 S.W.3d 758, 772 (Tex. 2003) (rejecting a battery claim by the parents of a prematurely born infant due to the hospital's life-sustaining efforts); Stewart-Graves v. Vaughn, 170 P.3d 1151, 1163 (Wash. 2007) (en banc) (rejecting the parents' claim of medical malpractice due to the successful resuscitative medical treatment of an infant who was born without a heartbeat but survived with severe and permanent disabilities).

57. 410 U.S. 113, 153–54 (1973).

Parenthood of Southeastern Pennsylvania v. Casey,[58] the Court issued opinions regarding abortion at least twenty times.[59] This is largely due to the legislative—as opposed to judicial—nature of the majority's opinion in *Roe*,[60] and the public's resistance to the seemingly unlimited nature of the abortion right that emerged from the Court's definition of "health" in *Doe v. Bolton*.[61]

Numerous other commentators have described the remarkable performance of the Court as what various Justices have characterized as the "Nation's *ex officio* medical board."[62] This description stems from the Court striking down laws that

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58. 505 U.S. 833, 845–46 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

59. *See* Rust v. Sullivan, 500 U.S. 173 (1991); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502 (1990); Hodgson v. Minnesota, 497 U.S. 417 (1990); Webster v. Reprod. Health Servs., 492 U.S. 490 (1989); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986); Diamond v. Charles, 476 U.S. 54 (1986); Simopoulos v. Virginia, 462 U.S. 506 (1983); Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476 (1983); City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983); H.L. v. Matheson, 450 U.S. 398 (1981); Williams v. Zbaraz, 448 U.S. 358 (1980); Harris v. McRae, 448 U.S. 297 (1980); Bellotti v. Baird, 443 U.S. 622 (1979); Colautti v. Franklin, 439 U.S. 379 (1979); Poelker v. Doe, 432 U.S. 519 (1977); Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977); Bellotti v. Baird, 428 U.S. 132 (1976); Singleton v. Wulff, 428 U.S. 106 (1976); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976).

During the confirmation hearings of Justices Alito and Roberts, Senator Arlen Specter claimed that the Court had thirty-eight occasions to overrule *Roe*. *See Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 321 (2006) [hereinafter *Alito Confirmation Hearing*] (statement of Sen. Arlen Specter, Chairman, S. Comm. on the Judiciary); *Roberts Confirmation Hearing*, *supra* note 1, 109th Cong. 145 (statement of Sen. Arlen Specter, Chairman, S. Comm. on the Judiciary). Our numbers differ due to additional cases between 1992—the year *Casey* was decided—and 2005—the year of the hearings regarding Chief Justice Roberts—and in part because of my exclusion of cases declined by the Court.

60. *See Roe*, 410 U.S. at 173 (Rehnquist, J., dissenting) ("[T]he conscious weighing of competing factors that the Court's opinion apparently substitutes for the established test is far more appropriate to a legislative judgment than to a judicial one.").

61. *See* 410 U.S. 179, 192 (1973). Specifically, the *Doe* Court noted the following: "We agree . . . that the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health." *Id.* The effect of this broad language is evidenced by a statement of Dr. Warren Hern of Colorado, the author of a textbook on abortion procedures: "I will certify that any pregnancy is a threat to a woman's life and could cause grievous injury to her physical health." Ruth Padawer, *Clinton May Back Abortion Measure; Seeks Middle Ground on Partial Birth Ban*, RECORD (Bergen County, N.J.), May 14, 1997, at A1 (internal quotation marks omitted).

62. *See* Forsythe & Presser, *supra* note 3, at 87 & n.2 (quoting *City of Akron*, 462 U.S. at 456 (O'Connor, J., dissenting)) (internal quotation marks omitted); Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 918 n.371 (2005) (citing *Danforth*, 428 U.S. at 99 (1976) (White, J., concurring in part and dissenting in part)); Richard A. Cordray & James T. Vradelis, Comment, *The Emerging Jurisprudence of Justice O'Connor*, 52 U. CHI. L. REV. 389, 400 (1985) (citing *City of Akron*, 462 U.S. at 456 (O'Connor, J., dissenting)). The first reference to the Court as the "ex officio medical board" came in Justice White's separate opinion in *Danforth*. *See* 428 U.S. at 99 (White, J., concurring in part and dissenting in part). Justice White noted,

> [T]he evidence discloses that the result [of the Missouri Act at issue] is a desirable one or at least that the legislature could have so viewed it. That should end our inquiry, unless we purport to be not only the country's continuous constitutional convention but also its *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States.

Id. Seven years later, in *City of Akron*, Justice O'Connor restated Justice White's earlier expression with the addition of the word "Nation." *See* 462 U.S. at 456 (O'Connor, J., dissenting) (quoting *Danforth*,

required parental consent prior to performance of an abortion on a minor;[63] overturning state requirements that a second physician be present during a postviability abortion to provide immediate medical care for any child surviving the abortion;[64] and invalidating bans on abortion by saline amniocentesis, notwithstanding clear evidence that safer methods of abortion were available.[65] However, a detailed review of all of the Court's abortion cases is not required to establish the point at which the Court erected an ambitious regulatory scheme on the faulty foundation of *Roe*; examination of *Planned Parenthood of Southeastern Pennsylvania v. Casey*[66] and *Stenberg v. Carhart*[67] will suffice.

A. The Hubris of Casey

Notwithstanding the Court's increasing demands that states end their attempts to legislate on the issue of abortion, state legislatures throughout the country continued to pass various abortion-related laws. Among these legislatures was Pennsylvania, which passed one of the most comprehensive abortion laws in the country in 1982.[68] The Pennsylvania law required that an abortion facility provide a woman with specific types of information prior to obtaining her consent to an abortion and that the facility observe a twenty-four hour waiting period prior to performance of the abortion;[69] that a parent consent prior to the performance of an abortion on a minor;[70] that a married woman acknowledge that she had notified her husband prior to obtaining an abortion;[71] and that abortion providers report various information, including the type of procedure performed, the duration of gestation prior to the abortion, and the existence and nature of complications.[72] When abortion providers challenged the constitutionality of the law, the state of Pennsylvania vigorously defended the law in every court, including the Supreme Court of the United States.[73]

After the Court's decision to uphold the Missouri abortion law at issue in *Webster v. Reproductive Health Services*,[74] many in the pro-life movement were cautiously optimistic that the Pennsylvania law would provide the vehicle for overturning *Roe*.[75] And in fact, they had good cause to be optimistic if the history

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428 U.S. at 99 (White, J., concurring in part and dissenting in part)). Summing up the future impact of the majority opinion in *City of Akron*, Justice O'Connor stated, "As today's decision indicates, medical technology is changing, and this change will necessitate our continued functioning as the Nation's '*ex officio* medical board . . . .'" *Id.*

63. *Danforth*, 428 U.S. at 74–75 (majority opinion).

64. *Thornburgh*, 476 U.S. at 769–71.

65. *Danforth*, 428 U.S. at 75–79.

66. 505 U.S. 833 (1992).

67. 530 U.S. 914 (2000).

68. *See* Abortion Control Act of 1982, 1982 Pa. Laws 476, Act No. 138 (codified as amended at 18 PA. CONS. STAT. §§ 3201–20 (2000)).

69. *Casey*, 505 U.S. at 844 (citing 18 PA. CONS. STAT. § 3205 (1990)).

70. *Id.* (citing 18 PA. CONS. STAT. § 3206).

71. *Id.* (citing 18 PA. CONS. STAT. § 3209).

72. *See id.* (citing 18 PA. CONS. STAT. §§ 3207, 3214).

73. *See id.* at 845.

74. 492 U.S. 490, 522 (1989).

75. *See* Ramesh Ponnuru, *Abortion Now: Thirty Years After* Roe, *a Daunting Landscape*, 55 NAT'L REV. 37, 37 (2003).

of the *Casey* opinion provided in Justice Blackmun's papers is accurate.[76] Justice Kennedy was initially prepared to provide the fifth vote to overrule *Roe* and return the issue of abortion to the people and their elected representatives, but Justice Kennedy was eventually persuaded to retain a judicial construction of the Constitution protecting the right of a woman to choose abortion,[77] which the *Casey* plurality characterized as the "essential holding of *Roe*."[78]

In what at least one legal scholar has characterized as the worst Supreme Court decision ever,[79] a majority of the Court upheld all provisions of the Pennsylvania statute except the requirement of husband notification.[80] Four of the Justices were prepared to overrule *Roe*;[81] two were adamant that *Roe* be retained;[82] and three were persuaded that the institutional integrity of the Court required continued protection of the practice.[83] With opinions on the Court so divided, the joint opinion of Justices O'Connor, Kennedy, and Souter became the controlling rule of law. In the opinion, these Justices do not affirm the correctness of *Roe*, nor do they declare that any interpretation of the Constitution's text limits the ability of states to protect unborn human life. Rather, they sidestep these issues, instead declaring that "the immediate question is not the soundness of *Roe*'s resolution of the issue, but the precedential force that must be accorded to its holding."[84]

Supporters and opponents of abortion rights have criticized the plurality opinion as unprincipled.[85] Perhaps the passage receiving the most negative attention

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76. *See* Linda Greenhouse, BECOMING JUSTICE BLACKMUN 203–06 (2005).

77. *See id.*

78. *See Casey*, 505 U.S. at 846.

79. Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1001 (2003).

80. *See Casey*, 505 U.S. at 879.

81. *Id.* at 944 (Rehnquist, C.J., concurring in part and dissenting in part). Speaking for Justices White, Scalia, and Thomas, Chief Justice Rehnquist wrote, "We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases." *Id.*

82. *Id.* at 914 (Stevens, J., concurring in part and dissenting in part) ("My disagreement with the joint opinion begins with its understanding of the trimester framework established in *Roe*. Contrary to the suggestion of the joint opinion, it is not a contradiction to recognize that the State may have a legitimate interest in potential human life and, at the same time, to conclude that the interest does not justify the regulation of abortion before viability . . . ." (internal citation and quotation marks omitted)); *id.* at 934 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("*Roe*'s requirement of strict scrutiny as implemented through a trimester framework should not be disturbed.").

83. *See id.* at 845–46 (joint opinion of O'Connor, Kennedy, Souter, JJ.) ("After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis*, we are led to conclude this: the essential holding of *Roe* v. *Wade* should be retained and once again reaffirmed.").

84. *Id.* at 871.

85. *See e.g.*, Janet Benshoof, Planned Parenthood v. Casey*: The Impact of the New Undue Burden Standard on Reproductive Health Care*, 269 J. AM. MED. ASS'N 2249, 2253 (1993) ("In distinguishing women's liberty to choose whether to continue a pregnancy from other 'fundamental' choices like those involving religion, speech, and marriage, the Court has made distinctions that are not justified in other areas of constitutional law, singling out one medical procedure and one personal choice."); Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling* Planned Parenthood of Southeastern Pennsylvania v. Casey, 22 CONST. COMMENT. 311, 336–46 (2005) (noting the flaws in the Court's reasoning behind the decision not to overrule *Roe*); Kathryn Kolbert & David H. Gans, *Responding to* Planned Parenthood v. Casey*: Establishing Neutrality Principles in State Constitutional Law*, 66 TEMP. L. REV. 1151, 1151–54 (1993) (arguing that

is the plurality's extravagant statement of the judicially-created right to decisional privacy:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State. [86]

This "sweet-mystery-of-life passage"[87] has been derided by legal commentators,[88] who have characterized it as "popular mythology,"[89] "an embarrassment and object

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the joint opinion in *Casey* based its holding more on the integrity of the Court than on any sound legal reasoning).

86. *Casey*, 505 U.S. at 851 (joint opinion of O'Connor, Kennedy, and Souter, JJ.). Based on this statement, the Court invalidated the Pennsylvania requirement that a married woman acknowledge that she had notified her husband of her intention to obtain an abortion, *id.* at 898, absent the woman providing the physician a written statement that (1) her spouse is not the father of the child; (2) after diligent effort, she could not locate her spouse; (3) "the pregnancy is the result of spousal sexual assault which she has reported" to law enforcement; or (4) she has reason to believe that notifying her spouse is likely to result in the infliction of bodily injury upon her by her spouse or by another individual. *Id.* at 887.

87. Lawrence v. Texas, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting).

88. *E.g.*, Gerard V. Bradley, *Shall We Ratify the New Constitution?: The Judicial Manifesto in* Casey *and* Lee, *in* BENCHMARKS: GREAT CONSTITUTIONAL CONTROVERSIES IN THE SUPREME COURT 117, 120–25 (Terry Eastland ed., 1995) (characterizing the mystery-of-life passage from *Casey* as creating a "Megaright"); John M. Breen & Michael A. Scaperlanda, *Never Get Out 'a the Boat:* Stenberg v. Carhart *and the Future of American Law*, 39 CONN. L. REV. 297, 312 (2006) ("The Court is able to ignore this violence because, in the case of abortion, it has abandoned the idea of ordered liberty in favor of a maximal conception of human freedom."); Patrick McKinley Brennan, *Against Sovereignty: A Cautionary Note on the Normative Power of the Actual*, 82 NOTRE DAME L. REV. 181, 191 (2006) ("It is the same Supreme Court that in one breath, per Justice Kennedy in a breathtaking bit of anti-metaphysics, identifies the 'heart of liberty [as] the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life,' that, in a next breath, per the same Justice Kennedy, makes metaphysical claims that would delight the medieval mind." (alteration in original) (quoting *Casey*, 505 U.S. at 851)); Bradley P. Jacob, *Back to Basics: Constitutional Meaning and "Tradition,"* 39 TEX. TECH. L. REV. 261, 275 (2007) ("Other constitutional rights in the popular mythology are not found anywhere in the Constitution itself, but the misperception is certainly understandable because the United States Supreme Court has declared that people have a constitutional right to privacy, to abortion, to homosexual sodomy, and even to 'define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.'" (quoting *Casey*, 505 U.S. at 851)).

89. Jacob, *supra* note 88, at 275.

of derision,"[90] "startling,"[91] "radical,"[92] and representing "the view that moral relativism is a constitutional command."[93]

The mystery-of-life passage has also formed the basis of a variety of claims by plaintiffs seeking to broaden the scope of constitutionally protected conduct. The New Jersey Supreme Court quoted the passage as part of its rationale for striking down a statutory requirement of parental notification prior to the performance of an abortion on a minor.[94] The passage has become almost an obligatory citation in the briefs of activists asserting a constitutional claim to recognition of same-sex unions as marriages.[95] In *Fleck & Associates, Inc. v. City of Phoenix*,[96] the plaintiff argued that the mystery-of-life passage encompasses a right to operate a business where adults can view or participate in live sex acts.[97] In another case, an adult bookstore employee relied upon the passage[98] to challenge the constitutionality of a Texas criminal prohibition of promoting an "obscene device."[99] A group of law school faculty members claimed that the *Casey* language created a right to "educational autonomy."[100] The plaintiffs in *Burt v. Rumsfeld* argued that this alleged right permitted colleges to disregard the Solomon Amendment[101]—a federal law prohibiting the exclusion of military recruiters from campuses receiving federal funds.[102]

Perhaps the most creative use of the mystery-of-life passage has been by an ex-husband who argued that his "concept of the universe" did not include the payment of court-ordered alimony.[103] That federal district court was unimpressed, declaring that any conflict between the judicial order and the man's concept of existence was legally irrelevant—at least in light of the extensive state proceedings related to the husband's liability.[104]

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90. Lino A. Graglia, Lawrence v. Texas*: Our Philosopher-Kings Adopt Libertarianism as Our Official National Philosophy and Reject Traditional Morality as a Basis for Law*, 65 OHIO ST. L.J. 1139, 1139 (2004).

91. *See* Francis George, *Law and Culture in the United States*, 48 AM. J. JURIS. 131, 145 (2003).

92. *See* G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 BYU L. REV. 829, 877 n.130.

93. *See* Richard S. Myers, *Same-Sex "Marriage" and the Public Policy Doctrine*, 32 CREIGHTON L. REV. 45, 64 (1998).

94. Planned Parenthood of Cent. N.J. v. Farmer, 762 A.2d 620, 622 (N.J. 2000) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992); *see also* Am. Acad. of Pediatrics v. Lungren, 940 P.2d 797, 813, 831 (Cal. 1997) (citing to *Casey* and California precedent to find that a statute requiring parental consent prior to performance of an abortion on a minor violated the California constitution).

95. *E.g.*, Appellants' Brief at 9–10, Smelt v. County of Orange, 447 F.3d 673 (9th Cir. 2006) (No. 05-56040), 2005 WL 3227255 (noting the mystery-of-life language from *Casey*); Brief for Amicus Curiae in Support of Appellants at 5 & n.1, Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006) (No. 6598), 2006 WL 1930145 (citing *Casey*, 505 U.S. at 851).

96. 471 F.3d 1100 (9th Cir. 2006).

97. *See id.* at 1104–05.

98. Petition for Writ of Certiorari at 16–17, Acosta v. Texas, *cert. denied*, 127 S. Ct. 129 (2006) (mem.) (No. 05-1574), 2006 WL 1594037 (quoting *Casey*, 505 U.S. at 851).

99. *See id.* at 22–24.

100. *See* Burt v. Rumsfeld, 354 F. Supp. 2d 156, 159, 189 (D. Conn. 2005).

101. *See id.*

102. 10 U.S.C. § 983 (2000).

103. *See* Martyak v. Martyak, 378 F. Supp. 2d 1365, 1368 (S.D. Fla. 2005).

104. *See id.* at 1368 & n.1.

The Court has subsequently attempted to limit the reach of the mystery-of-life passage in *Washington v. Glucksberg*,[105] rejecting the claim of a constitutional right to physician-assisted suicide.[106] Yet the language reemerged as a constitutional justification for finding all criminal prohibitions of sodomy unconstitutional in *Lawrence v. Texas*.[107]

Yet, even more troubling than the plurality's awkward philosophizing is its demand that the American people submit to its judgment regarding abortion. The joint opinion noted,

> Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.[108]

The contending sides might have more respect for the Court's mandate if the Court could definitively identify the text of the Constitution that compelled its decision. Absent such identification, there seems little justification for accepting the Justices' political judgment as superior to that of other citizens.

The *Casey* plurality opinion also seems to suggest that any hope of the citizenry that the Court would return abortion to the political process decreases in direct proportion to public criticism of the Court's usurpation of the issue: "[T]o overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question."[109] As Chief Justice Rehnquist notes in his critique of the plurality, "when the Court has ruled on a divisive issue, it is apparently prevented from overruling that decision for the sole reason that it was incorrect, *unless opposition to the original decision has died away*."[110]

Justice Scalia was even sharper in his criticism:

> The Imperial Judiciary lives. It is instructive to compare this Nietzschean vision of us unelected, life-tenured judges—leading a Volk who will be "tested by following," and whose very "belief in themselves" is mystically bound up in their "understanding" of a Court that "speak[s] before all others for their constitutional

105. 521 U.S. 702, 726–28 (1997) (quoting *Casey*, 505 U.S. at 851).
106. *Id.*
107. *See* 539 U.S. 558, 574 (2003) (quoting *Casey*, 505 U.S. at 851).
108. *Casey*, 505 U.S. at 866–67 (joint opinion of O'Connor, Kennedy, Souter, JJ.).
109. *Id.* at 867.
110. *Id.* at 958 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (emphasis in original).

> ideals"—with the somewhat more modest role envisioned for these lawyers by the Founders.[111]

Justice Scalia then quotes the Federalist Papers as establishing a less exalted understanding of the role of the judiciary.[112]

Complaints of overreaching by judges have a long a history in our nation. Thomas Jefferson was one of the early critics of the Supreme Court:

> [T]he judiciary bodies were supposed to be the most helpless and harmless members of the government. Experience, however, soon showed in what way they were to become the most dangerous; that the insufficiency of the means provided for their removal gave them a freehold and irresponsibility in office; that their decisions, seeming to concern individual suitors only, pass silent and unheeded by the public at large; that these decisions, nevertheless, become law by precedent, sapping, by little and little, the foundations of the constitution, and working its change by construction, before any one has perceived that that invisible and helpless worm has been busily employed in consuming its substance. [113]

Abraham Lincoln expressed similar dissatisfaction in his first inaugural address: "[I]f the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal."[114]

The *Casey* plurality's abstract reasoning and complete disregard of the primacy of the democratic process in resolving difficult communal questions led some public figures to publicly question whether the American people remain in control of the Nation's collective destiny. Introducing a symposium published in the book *The End of Democracy?: The Judicial Usurpation of Politics*, the editors of the journal *First Things* wrote the following:

> This symposium addresses many similarly troubling judicial actions that add up to an entrenched pattern of government by judges that is nothing less than the usurpation of politics. The question here explored, in full awareness of its far-reaching consequences, is whether we have reached or are reaching the

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111. *Id.* at 996 (Scalia, J., concurring in the judgment in part and dissenting in part) (quoting *Casey*, 505 U.S. at 868 (joint opinion of O'Connor, Kennedy, and Souter, JJ.)).

112. *See id.* ("The judiciary . . . has . . . no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment . . . ." (quoting THE FEDERALIST NO. 78, at 393–94 (Alexander Hamilton) (G. Willis ed., 1982)) (internal quotation marks omitted)).

113. Letter from Thomas Jefferson to Monsieur A. Coray (Oct. 31, 1823), *in* THE WRITINGS OF THOMAS JEFFERSON 480, 487 (Albert Ellery Bergh ed., 1907).

114. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* THE INAUGURAL ADDRESSES OF THE PRESIDENTS 187, 194 (John Gabriel Hunt ed., Gramercy Books 1997).

> point where conscientious citizens can no longer give moral assent to the existing regime.[115]

In commenting on *Casey* and other opinions from the same judicial term, Judge Robert Bork observed, "This last term of the Supreme Court brought home to us with fresh clarity what it means to be ruled by an oligarchy. The most important moral, political, and cultural decisions affecting our lives are steadily being removed from democratic control."[116] Professor Robert George joined Judge Bork in questioning the effect of *Casey* on the American political system:

> To say that the worst abuses of human rights have come from the least democratic branch of government—the judiciary—is true, but of increasingly questionable relevance to the crisis of democratic legitimacy brought on by judicial action in the cause of abortion and euthanasia. In practice, the American scheme of constitutional democracy invests the courts with ultimate authority to decide what the Constitution is to mean. Judicial action and appointments can, and sometimes do, become major issues in national elections. The refusal of the courts over more than twenty-three years to reverse *Roe v. Wade* must, then, be accounted a failure of American democracy.[117]

All of these concerns were expressed prior to the Court's rejection of the laws of thirty-one states on the basis of one physician's testimony and supporting experts' speculation.[118]

B. Indifference to Evidence in Stenberg v. Carhart

If the *Casey* plurality opinion exemplifies new heights of judicial arrogance in its demand that the American people submit to its judgment regarding the legal status of the unborn and the morality of abortion,[119] the opinion of the majority in *Stenberg v. Carhart*[120] reflects new lows in judicial respect for facts when adjudicating constitutional disputes.

As described by the majority, the issue before the Court in *Stenberg* was "whether Nebraska's statute, making criminal the performance of a 'partial birth

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115. Editors of FIRST THINGS, *Introduction* to THE END OF DEMOCRACY?: THE JUDICIAL USURPATION OF POLITICS 3 (Mitchell S. Muncy ed., 1997); *see also* Charles W. Colson, *Kingdoms in Conflict*, *in* THE END OF DEMOCRACY?: THE JUDICIAL USURPATION OF POLITICS, *supra*, at 41, 47 ("At what point does a government become sufficiently corrupt that Christians must actively resist it? [A]nd, [h]as the United States, under its current judicial regime, reached such a point?").

116. Robert H. Bork, *Our Judicial Oligarchy*, *in* THE END OF DEMOCRACY?: THE JUDICIAL USURPATION OF POLITICS, *supra* note 115, at 10, 10.

117. Robert P. George, *The Tyrant State*, *in* THE END OF DEMOCRACY?: THE JUDICIAL USURPATION OF POLITICS, *supra* note 115, at 53, 61.

118. *See* Stenberg v. Carhart, 530 U.S. 914, 979 (Kennedy, J. dissenting) ("Ignoring substantial medical and ethical opinion, the Court substitutes its own judgment for the judgment of Nebraska and some 30 other States and sweeps the law away.").

119. *See supra* text accompanying note 108.

120. 530 U.S. 914.

abortion,' violates the Federal Constitution, as interpreted in [*Casey*] and [*Roe*]."[121] Looking to the dictates of *Casey* and finding that "substantial medical authority supports the proposition that banning [this] particular abortion procedure could endanger women's health,"[122] the majority concluded that the statute was unconstitutional because it contained no health exceptions to protect a woman's life.[123] Yet, the evidence presented to the trial court reveals that the Nebraska legislature's conclusion that the statute did not require a health exception was well supported by substantial medical authority.

The plaintiff, Dr. Carhart, was the only witness who had ever performed partial-birth abortions—"D & X" or "intact D & E" abortions—and he testified that he only chose to perform a D & X when the fetus was presented in a "footling breech"[124] or where repositioning the fetus from a side presentation resulted in a footling breech presentation.[125] If the partial-birth abortion procedure was medically superior to dismemberment abortion, it would seem that Dr. Carhart would have repositioned the fetus to allow use of the superior method, but he admittedly did not do so.[126] This fact suggests that his use of the procedure was more a matter of convenience than of medical necessity.

None of the experts called to testify on the plaintiff's behalf had any experience with the procedure. Dr. Stubblefield, the expert that the trial court relied upon extensively, "ha[d] not performed this procedure himself, nor ha[d] he viewed anyone else perform it."[127] Similarly, Dr. Carhart's other expert, Dr. Hodgson, "performed or supervised at least 30,000 abortions"[128] and yet had never "intentionally performed an intact D & E."[129] Notwithstanding these experts' lack of experience with the procedure, both doctors were confident that some circumstances existed in which the protection of a woman's health would require its use.

The American College of Obstetricians and Gynecologists (ACOG) expressed similar unfounded confidence:

> A select panel convened by ACOG *could identify no circumstances* under which this procedure [intact D & X] would

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121. *Id.* at 929–30 (citations omitted).

122. *Id.* at 938.

123. *Id.* at 930 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (joint opinion of O'Connor, Kennedy, and Souter, JJ.)). The majority further determined that the statute was unconstitutional because the definition of the proscribed procedure "covers a much broader category of procedures" than partial-birth abortion. *See id.* at 939. The Court interpreted the statute to include dismemberment—"D & E"—abortions, *see id.* at 944–46, which "(together with a modified form of vacuum aspiration used in the early second trimester) accounts for about 95% of all abortions performed from 12 to 20 weeks of gestational age," *id.* at 924. While the second holding required judicial gymnastics to avoid application of the common canon of construction that requires courts to adopt narrowing constructions to avoid constitutional infirmity, that issue is not the focus of this Article's critique.

124. The district court opinion defined "footling breech" as a "feet-first position." Carhart v. Stenberg, 972 F. Supp. 507, 521 (D. Neb. 1997).

125. *Id.* at 521 & n.20.

126. *Id.*

127. Carhart v. Stenberg, 11 F. Supp. 2d 1099, 1112 (D. Neb. 1998).

128. *Id.* at 1105 n.9.

129. *Id.* at 1107.

> be the *only* option to save the life or preserve the health of the woman. An intact D & X, however, may be the best or most appropriate procedure in a particular circumstance to save the life or preserve the health of a woman, and only the doctor, in consultation with the patient, based upon the woman's particular circumstances can make this decision.[130]

The American Medical Association (AMA) expressed a more objective opinion when it stated that "there does not appear to be any identified situation in which intact D&X is the only appropriate procedure to induce abortion."[131] In furtherance of that position—and during the 1997 congressional attempt to ban this procedure—the AMA issued a press release supporting the proposed Federal Partial-Birth Abortion Ban of 1997. The AMA press release described the partial-birth abortion procedure as "broadly disfavored—both by experts and the public . . . . It is a procedure which is never the only appropriate procedure and has no history in peer reviewed medical literature or in accepted medical practice development."[132] The AMA's *Fact Sheet on HR 1122* stated that "[i]ntact D&X is not an accepted 'medical practice,' . . . . [T]he Board's expert scientific report recommends against its use."[133]

Public statements of a recognized abortion expert support the foregoing conclusion of the AMA: "'I have very serious reservations about this procedure,' said Colorado physician Warren Hern, MD. The author of Abortion Practice, the nation's most widely used textbook on abortion standards and procedures, Dr. Hern specializes in late-term procedures."[134] Regarding intact D & E's, Dr. Hern stated, "'You really can't defend it.'"[135]

At the time *Stenberg* was being litigated, the only medical textbook to discuss partial-birth abortion was the result of an editorial effort by the National Abortion Federation—a group comprised of North American abortion providers.[136] The text contained no claim that the technique was ever medically necessary. Rather, the authors wrote the following:

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130. AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS, ABORTION POLICY 3 (2004) (first emphasis added). The district court specifically relied on this language. *See Stenberg*, 11 F. Supp. 2d at 1105 n.10.

131. AM. MED. ASS'N, H-5.982 LATE-TERM PREGNANCY TERMINATION TECHNIQUES, *available at* http://www.ama-assn.org/apps/pf_new/pf_online?f_n=resultLink&doc=policyfiles/HnE/H-5.982.HTM&s_t=h-5.982&catg=AMA/HnE&catg=AMA/BnGnC&catg=AMA/DIR&&nth=1&&st_p=0&nth=1& (last visited June 1, 2008).

132. *See* Brief Amici Curiae of Ass'n of American Physicians and Surgeons et al. in Support of Petitioners at app., Stenberg v. Carhart, 530 U.S. 914 (2000) (No. 99-830), 2000 WL 228448 (reproducing Press Release, Am. Med. Ass'n, AMA Supports H.R. 1122 as Amended (May 20, 1997)).

133. *See id.* (reproducing AM. MED. ASS'N, FACT SHEET ON H.R. 1122 (1997)). Notwithstanding the AMA's clear reliance on the absence of evidence regarding the safety and necessity of the procedure, and its refusal to rely on mere speculation, the district court characterized the AMA's statements as "irrelevant" and "political rhetoric." Carhart v. Stenberg, 972 F. Supp. 507, 525 n.27 (D. Neb. 1997).

134. Diane M. Gianelli, *Outlawing Abortion Method: Veto-Proof Majority in House Votes to Prohibit Late-Term Procedure*, AM. MED. NEWS, Nov. 20, 1995, at 3.

135. *Id.*

136. *See* MAUREEN PAUL ET AL., A CLINICIAN'S GUIDE TO MEDICAL AND SURGICAL ABORTION (1999).

> Intact D&E is used as a method of second trimester abortion and, in the case of compromised pregnancies, as a technique for third trimester terminations. Intactness allows unhampered evaluation of structural abnormalities and can be an aid to patients grieving a wanted pregnancy by providing the opportunity for a final act of bonding.[137]

Only under the Court's overly-expansive definition of "health" in *Doe v. Bolton*[138] could a plaintiff successfully assert that a law regulating abortion unconstitutionally burdens a woman's right to obtain an abortion because it interferes with evaluation of fetal structural abnormalities and fails to assist a patient's grieving process.

The substantial medical authority relied upon by the majority in overturning the partial-birth abortion bans of thirty-one states[139] included only the testimony of a single physician plaintiff, and unsubstantiated speculation by his experts and a professional association. Just as *Roe* was based on selective review of the history of abortion, *Stenberg* was based on selective review of the medical evidence regarding the necessity of partial-birth abortion to preserve a woman's health. Similar to *Casey*'s command that the people submit to the Court's judgment regarding the legality of abortion, *Stenberg* commanded Americans to accept physicians initiating childbirth for the purpose of killing the child immediately before the child emerged from the womb.[140] Such was the state of abortion law when Judge John G. Roberts, Jr., was confirmed as Chief Justice of the United States Supreme Court.

IV. EARLY RETURNS FROM THE ROBERTS' COURT: *AYOTTE* AND *GONZALES*

A. Ayotte v. Planned Parenthood of Northern New England

The question of whether a "health exception" is required in every law related to abortion returned to the Court in one of the first cases to be decided during Chief Justice Roberts's tenure. In *Ayotte v. Planned Parenthood of Northern New England*,[141] the constitutionality of New Hampshire's parental notification law was

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137. W. Martin Haskell, Thomas R. Easterling & E. Steve Lichtenberg, *Surgical Abortion After the First Trimester*, *in* A CLINICIAN'S GUIDE TO MEDICAL AND SURGICAL ABORTION, *supra* note 136, at 123, 136.

138. *See* 410 U.S. 179, 192 (1973).

139. *See* Stenberg v. Carhart, 530 U.S. 914, 979 (2000) (Kennedy, J., dissenting) ("Ignoring substantial medical and ethical opinion, the Court substitutes its own judgment for the judgment of Nebraska and some 30 other States and sweeps the law away.").

140. *See id.* at 963. In his dissent, Justice Kennedy noted,

> D & X's stronger resemblance to infanticide means Nebraska could conclude the procedure presents a greater risk of disrespect for life and a consequent greater risk to the profession and society, which depend for their sustenance upon reciprocal recognition of dignity and respect. The Court is without authority to second-guess this conclusion.

Id. The difficulty in distinguishing the practice of partial-birth abortion from infanticide is the primary point argued in the amicus brief filed in the Supreme Court on behalf of the states of Louisiana and Mississippi. *See* Brief of Amici Curiae Louisiana and Mississippi in Support of Petitioners at 1, *Stenberg*, 530 U.S. 914 (No. 99-830), 2000 WL 228483.

141. 546 U.S. 320 (2006).

challenged because the law did not contain an express exception allowing performance of an abortion on a minor without parental notice in cases where the performance of the abortion was necessary to preserve the minor's health.[142] During committee hearings, legislators had debated whether a health exception was constitutionally required due to the holding of *Stenberg*. At the time of the debates, only the United States Court of Appeals for the Tenth Circuit had considered the question,[143] and it had concluded that *Stenberg* required a health exception in every law related to abortion, including laws requiring parental notification.[144] Opponents of the required inclusion of a health exception argued that the breadth of the exception—at least as articulated in *Doe v. Bolton*[145]—effectively eliminated any requirement of parental involvement.[146] They pointed to the fact that the Supreme Court had approved a Minnesota parental notification law that had no health exception[147] in *Hodgson v. Minnesota*.[148] Ultimately, opponents of the required inclusion of a health exception won the day, and the law was codified with only an exception for emergency abortions to preserve the life of the mother.[149]

New Hampshire abortion providers immediately challenged the law, in part due to the absence of a health exception.[150] The Office of New Hampshire Attorney General Peter Heed replied, arguing that the providers had not established their entitlement to facially attack the statute.[151] The reply contained no challenges to the

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142. *Id.* at 326. The Act allowed a physician to bypass parental notification in cases where "the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice." N.H. REV. STAT. ANN. § 132.26(I)(a) (LexisNexis 2006) (repealed June 29, 2007). The Act also allowed a pregnant minor to bypass parental notification by obtaining a court order ruling that she was "mature and capable of giving informed consent to the proposed abortion" or that "the performance of an abortion upon her without notification of her parent, guardian, or conservator would be in her best interests." *Id.* § 132.26(II) (repealed June 29, 2007).

143. *See* Planned Parenthood of the Rocky Mountains Servs., Corp. v. Owens, 287 F.3d 910, 916–17 (10th Cir. 2002).

144. *Id.* at 917–18.

145. *See* 410 U.S. 179, 192 (1973).

146. Stephen Frothingham, *Heed Will Fight Ruling on Abortion*, CONCORD MONITOR, Dec. 30, 2003, *available at* www.cmonitor.com/apps/pbcs.dll/article?AID=/20031231/REPOSITORY/312310326 ("'We didn't mistakenly forget to put in a health exception. We purposely crafted a bill without an exception,' said Rep. Fran Wendelboe, a Republican from New Hampton. She said a health exception would be an 'open door.' 'It would pretty much mean you would have no parental notice at all. Because who makes the decision about what is a health exception? The abortionist, who is already 100 percent gung-ho to do an abortion,' she said.").

147. *See* Phyllis Woods, *Parental Notification Protects Young Girls*, CONCORD MONITOR, Nov. 30, 2005, *available at* www.cmonitor.com/apps/pbcs.dll/article?AID=/20051201/REPOSITORY/512010334.

148. *See* 497 U.S. 417, 422–23 (1990). The continuing viability of *Hodgson* is evidenced by its citation in *Lambert v. Wicklund*, 520 U.S. 292, 298 n.4 (1997) (per curiam) (citing *Hodgson*, 497 U.S. at 497 (Kennedy, J., concurring in the judgment in part and dissenting in part)), and *Planned Parenthood of Northern New England v. Heed*, 390 F.3d 53, 60 (1st Cir. 2004) (citing *Hodgson*, 497 U.S. at 417).

149. *See* N.H. REV. STAT. ANN. § 132.26(I) (LexisNexis 2006) (repealed June 29, 2007).

150. *See* Planned Parenthood of N. New Eng. v. Heed, 296 F. Supp. 2d 59, 61–62 (D.N.H. 2003).

151. *See id.* at 62–63. Former Attorney General Heed resigned from office after filing an appeal of the trial court's judgment, due to allegations that he had acted inappropriately toward a state employee at a conference. Allison Steele, *Revisiting the Stories that Were*, CONCORD MONITOR, Dec. 30, 2004, *available at* www.cmonitor.com/apps/pbcs.dll/article?AID=/20041231/REPOSITORY/412310302. Former Attorney General Heed was subsequently cleared of any criminal wrongdoing, and questions were raised about whether he was improperly pressured to resign. *Id.*

factual assertions contained in plaintiffs' affidavits, nor was there any attempt to present evidence establishing that a health exception was unnecessary.[152] The state's failure to challenge the assertions contained in plaintiffs' affidavits and to present evidence of other states' experiences with parental notification laws reduced the case to legal questions regarding the propriety of facial challenges and the applicability of *Stenberg* to parental involvement laws.[153] This was a serious mistake.

New Hampshire might well have prevailed in the district court if the attorney general had challenged the plaintiffs' representation of the facts. The affidavits presented by plaintiffs contained no statements that the witnesses had ever been required to perform an emergency abortion in order to preserve a minor's health.[154] Instead, similar to the expert opinion in *Stenberg*, the witnesses speculated about various possible conditions or circumstances that would require the performance of an abortion prior to the notification of a minor's parent.[155] Their reliance upon mere speculation, along with the absence of testimony regarding actual cases that required emergency abortions, is significant in light of the experience in other states that require parental involvement.

For example, Minnesota's parental involvement law has been in effect for over twenty years and has no health exception.[156] During the initial six years when parental notification was required (prior to a brief period of nonenforcement due to consideration of constitutional challenges in *Hodgson*), there was not a single report of medical complications caused by the law, or a single case of parental prevention or coercion of an abortion:

> [A]fter some five years of the [parental involvement] statute's operation, the evidence does not disclose a single instance of abuse or forceful obstruction of abortion for any Minnesota minor. The plaintiffs also conceded that there was no evidence of any increase in medical complications which could be attributed to the law.[157]

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152. Defendant's Memorandum of Law in Support of Objection to Request for Declaratory and Injunctive Relief, *Heed*, 296 F. Supp. 2d 59 (No. Civ-03-491-JD), 2003 WL 25494036; *see also Heed*, 296 F. Supp. 2d at 62 ("The Attorney General filed an objection, and the plaintiffs filed a reply. No surreply was filed. The parties have agreed that the court may decide the plaintiffs' requests for a declaratory judgment and permanent injunctive relief on the merits based on their present filings.").

153. *See Heed*, 296 F. Supp. 2d at 62–66.

154. *See* Declaration of Wayne Goldner, M.D., *Heed*, 296 F. Supp. 2d 59 (No. Civ-03-491-JD), 2006 WL 4099372; Declaration of Rachel Atkins, P.A., M.P.H., *Heed*, 296 F. Supp. 2d 59 (No. Civ-03-491-JD), 2003 WL 25481704.

155. Rachel Atkins affidavit merely stated, "I fear that, without a proper health exception, minors who fear notifying their parents of their abortion decision will be deterred from seeking and obtaining abortions they need in urgent medical circumstances." Declaration of Rachel Atkins, *supra* note 154, at ¶ 10. Dr. Goldner's affidavit merely describes various conditions that may require emergency abortions but contains no statement that he ever has been presented with such a case. *See* Declaration of Wayne Goldner, *supra* note 154 at ¶¶ 8, 10, 12–14.

156. *See* Act of May 19, 1981, ch. 228, 1981 Minn. Laws 1011 (codified as amended at MINN. STAT. ANN. § 144.343 (2005)).

157. Brief of Minnesota Governor Tim Pawlenty & North Dakota Governor John Hoeven as Amici Curiae in Support of Petitioner at apps. 2, 7, Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320 (2006) (No. 04-1144), 2005 WL 2046362 (reproducing Hubert H. Humphrey, III, *Background*

A review of the Health Department statistics following the *Hodgson* case makes clear that the state's parental notification law has not resulted in increased complications or harm to minors' health.[158]

Minnesota's record of few emergency abortions is similar to that of other states providing public reports regarding the circumstances surrounding abortion:

> *No* medical emergency abortions have been reported in the last four years in Alabama, the last six years in Nebraska, the last three years in Wisconsin, or at any time under the Idaho (four years), South Carolina (seven years) and Texas (five and one-half years) statutes since physicians have been required to report emergency abortions. Almost *30,000* abortions were performed on minors in these six States during these years without even *one* reported medical emergency.[159]

The absence of any reports of emergency abortions performed to protect the health of the mother suggests that speculation regarding pregnancy complications that would require such abortions is exactly that—speculation—and provides no basis for constitutional complaint.[160]

But the district court was not presented with a record reporting the operation of parental involvement laws in other states. Nor were the plaintiffs' witnesses required to prove the facts of their claim. So it is unremarkable that the district court rendered judgment for the plaintiffs and permanently enjoined enforcement of the New Hampshire law.[161] This ruling was affirmed by the United States Court of Appeals for the First Circuit,[162] which declared that *Stenberg* required the inclusion of a health exception in every abortion law.[163] The Supreme Court granted certiorari but did not address the absence of the health exception because the New Hampshire attorney general did not contest its necessity.[164] Instead, in the first (and probably last) unanimous opinion regarding abortion laws, the Court assumed arguendo that the Constitution required a health exception, and remanded the case to the First Circuit to determine if it was possible to craft an injunction or declaratory judgment as to the unconstitutional parts of the law while allowing the rest to remain.[165]

Briefing Concerning the Minnesota Parent Notification Law (1989)).

158. The Minnesota Department of Health provides annual reports to the legislature regarding complications arising from abortion. The eight most recent reports are made available on the department's web site, available at http://www.health.state.mn.us/divs/chs/abrpt/abrpt.htm.

159. Brief Amicus Curiae of the Thomas More Society in Support of Petitioner at 21, *Ayotte*, 546 U.S. 320 (No. 04-1144), 2005 WL 1865476.

160. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) ("[I]t must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'") (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38, 43 (1976)); City of L.A. v. Lyons, 461 U.S. 95, 101 (1983) ("Abstract injury is not enough.").

161. *See* Planned Parenthood of N. New Eng. v. Heed, 296 F. Supp. 2d 59, 68 (D.N.H. 2003).

162. Planned Parenthood of N. New Eng. v. Heed, 390 F.3d 53, 62 (1st Cir. 2004).

163. *See id.* at 60.

164. *See Ayotte*, 546 U.S. at 327–28.

165. *See id.* at 323 ("If enforcing a statute that regulates access to abortion would be unconstitutional in medical emergencies, ... invalidating the statute entirely is not always necessary or justified, for lower courts may be able to render narrower declaratory and injunctive relief.").

B. Gonzales v. Carhart

Just one year later, the Court again took up the question of whether the Constitution required a health exception in all abortion-related laws. Consolidating appeals from the United States Courts of Appeals for the Eighth and Ninth Circuits, the Court considered whether the Partial-Birth Abortion Ban Act of 2003 is invalid because it lacks a health exception or is otherwise unconstitutional on its face.[166] Similar to the evidentiary record in *Stenberg*,[167] none of the physicians testifying at trials just prior to *Gonzales* could identify a single instance in which they had intentionally performed a D & X (partial-birth) abortion because it was the medically superior method of abortion in protecting the health of the mother.[168] In contrast to *Stenberg*, by the time of *Gonzales* a peer-review study of partial-birth abortion existed, but the study was inconclusive as to whether D & X was superior to D & E.[169] Dr. Chasen, an early advocate of D & X abortion and the author of the study, testified at trial that according to the study's results, there was no difference between the partial-birth and dismemberment abortions with regard to the mother's blood loss, procedure time, or short-term complication rates.[170]

> The two procedures have similar complication rates. Dr. Chasen admitted that the study did not prove that D & X is superior to D & E. He also testified that the study could not claim that D & X was as safe as D & E.
>
> The study showed that for the small group of women for whom subsequent pregnancy information was available, spontaneous birth occurred in 2 of 17 (11.8%) of the D & X group, and 2 of 45 (4.4%) of the D & E group. Although this difference may be statistically insignificant given the few patients in the study, it was sufficient to signal a cause for concern for some of the experts. The study also showed that the D & X group experienced a higher rate of cervical laceration (2.4%) than the D & E group (.8%). Dr. Sprang derived this number from the data in the Chasen study. While the sample size was too small to be statistically significant, it tends to show that D & X has the potential to cause more trauma to the cervix.[171]

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166. *See* Gonzales v. Carhart, 127 S. Ct. 1610, 1619–20 (2007).

167. *See supra* text accompanying notes 124–29.

168. *See e.g.*, Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278, 308 (2d Cir. 2006) (Straub, J., dissenting) ("[T]he plaintiffs and their experts agreed that they had never encountered a situation where D & X was the only available procedure or where the mother's health required a D & X."); *infra* note 189 and accompanying text.

169. *See* Stephen T. Chasen et al., *Dilation and Evacuation at ≥ 20 Weeks: Comparison of Operative Techniques*, 190 AM. J. OBSTETRICS & GYNECOLOGY 1180 (2004).

170. *Nat'l Abortion Fed'n*, 437 F.3d at 309 (Straub, J. dissenting); *see also* Carhart v. Gonzales, 413 F.3d 791, 803 (8th Cir. 2005) ("The study found no significant difference in blood loss, procedure time, or short-term complication rates between the procedures.").

171. *Nat'l Abortion Fed'n,* 437 F.3d at 309 (Straub, J., dissenting) (internal quotation marks omitted).

These facts led the federal district court in New York to conclude the following:

> After hearing all of the evidence, as well as considering the record before Congress, the Court does not believe that many of Plaintiffs' purported reasons for why D & X is medically necessary are credible; rather they are theoretical or false. In addition, Dr. Chasen's study was initiated with the knowledge that Congress was considering a partial-birth abortion ban. Not only did the study fail to prove the alleged safety advantages of D & X over D & E, it raised serious questions about the potential health risks to women that D & X poses, namely, the risk of future preterm births due to increased cervical dilation during a D & X.[172]

Nonetheless, the court felt constrained by *Stenberg*'s "substantial medical authority" standard[173] and struck down the federal Act:

> The Government contends that the lack of a health exception does not make the Act unconstitutional if, looking at the congressional record supplemented by the trial testimony, the Court determines that Congress was reasonable in its finding that D & X is never medically necessary to protect a woman's health. *Stenberg* does not countenance that approach. Instead, the relevant inquiry (assuming, as the Court does, that *Turner* applies) is whether Congress reasonably determined, based on substantial evidence, that there is no significant body of medical opinion believing the procedure to have safety advantages for some women.... Under that standard, Congress's factfindings were not reasonable and based on substantial evidence.[174]

The Court of Appeals for the Second Circuit affirmed the decision of the New York federal district court.[175] Thus, Justices Thomas and Kennedy were prophetic when they stated that the standard adopted in *Stenberg* would render abortion law subject to the veto of a single physician, allowing a single abortion provider to set "abortion policy for the State . . . , not the legislature or the people."[176]

The Partial-Birth Abortion Ban Act of 2003 was also challenged in the United States District Court for the Northern District of California.[177] Initially, Planned Parenthood brought suit challenging the law because of the absence of a maternal

172. Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436, 480 (S.D.N.Y. 2004).

173. *See* Stenberg v. Carhart, 530 U.S. 914, 938 (2000) (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.))

174. *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 488 (internal citation omitted).

175. *Nat'l Abortion Fed'n*, 437 F.3d at 281.

176. *Stenberg*, 530 U.S. at 965 (Kennedy, J., dissenting).

177. *See* Planned Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 957 (N.D. Cal. 2004).

health exception.[178] The City and County of San Francisco subsequently intervened as plaintiffs.[179]

The identity of the plaintiffs was odd because the Act, by its terms, applies to only physicians or individuals.[180] "Physician" is defined by the Act, and that definition does not include corporations or government entities.[181] The lack of the Act's applicability to the plaintiffs was reinforced by California state law, which permits only physicians to perform surgical abortions.[182] Thus, there was no threat of direct enforcement of the Act against the plaintiffs.

Under normal jurisdictional analysis, the absence of a physician plaintiff would be fatal to the plaintiffs' case.[183] The Court has noted in the past, "Only those to whom a statute applies and who are adversely affected by it can draw in question its constitutional validity in a declaratory judgment proceeding as in any other."[184] No doubt the organizational and municipal plaintiffs could have found physicians to join them in their challenge—which would have cured the jurisdictional defect—but the case should not have proceeded until that occurred.[185] Yet the plaintiffs' lack of standing was not raised in the district court or the Ninth Circuit, arguably suggesting an unseemly eagerness to declare the law unconstitutional. Like the Court of Appeals for the Eighth Circuit,[186] the Ninth Circuit read *Stenberg* as requiring a health exception and affirmed the district court's ruling of the Act's unconstitutionality.[187]

The Supreme Court granted review, consolidating appeals from the Eighth and Ninth Circuits.[188] By the time it heard oral arguments, the Court of Appeals for the

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178. *See id.* at 966–67.

179. *See id.* at 957.

180. *See* 18 U.S.C. § 1531 (Supp. IV 2004).

181. *Id.* § 1531(b)(2). Specifically, the Act provides,

> [T]he term "physician" means a doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the State in which the doctor performs such activity, or any other individual legally authorized by the State to perform abortions: *Provided, however,* [t]hat any individual who is not a physician or not otherwise legally authorized by the State to perform abortions, but who nevertheless directly performs a partial-birth abortion, shall be subject to the provisions of this section.

Id.

182. *See* CAL. BUS. & PROF. CODE § 2253(b)(1) (West 2003). Only natural persons can be physicians under California law. *See id.* § 2032; Lathrop v. Healthcare Partners Med. Group, 8 Cal. Rptr. 3d 668, 673 (Cal. Ct. App. 2004) (limiting the term "health care provider" to include only "natural" persons).

183. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 473 (1982).

184. Ala. State Fed'n of Labor v. McAdory, 325 U.S. 450, 463 (1945) (citations omitted); *see also* Blair v. United States, 250 U.S. 273, 279 (1919) ("Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, *when the question is raised by a party whose interests entitle him to raise it.*" (emphasis added)).

185. *See* Kowalski v. Tesmer, 543 U.S. 125, 134 (2004) (rejecting third-party standing of attorneys on behalf of hypothetical, prospective clients).

186. Carhart v. Gonzales, 413 F.3d 791, 803 (8th Cir. 2005).

187. Planned Parenthood Fed'n of Am., Inc. v. Gonzales, 435 F.3d 1163, 1175–76 (9th Cir. 2006). The court also declared the Act to be unconstitutionally vague and to unduly burden the right to obtain previability abortions. *Id.* at 1180, 1184.

188. *See* Gonzales v. Carhart, 127 S. Ct. 1610, 1619–20 (2007).

Second Circuit had also declared the Act unconstitutional.[189] In a bitterly divided five-to-four vote,[190] the Supreme Court reversed the decision of the Eighth and Ninth Circuits.[191] The Court held that the Act was sufficiently clear to give physicians adequate warning of the conduct that was prohibited;[192] that Congress was within its constitutional authority to proscribe this particular abortion technique;[193] and that the prohibition did not unduly burden a woman's right to obtain an abortion.[194] In reaching these conclusions, the majority made clear that the state's power to regulate abortion is not limited to cases where medical opinion is undivided:

> As illustrated by respondents' arguments and the decisions of the Courts of Appeals, *Stenberg* has been interpreted to leave no margin of error for legislatures to act in the face of medical uncertainty. . . .
>
> A zero tolerance policy would strike down legitimate abortion regulations, like the present one, if some part of the medical community were disinclined to follow the proscription. This is too exacting a standard to impose on the legislative power, exercised in this instance under the Commerce Clause, to regulate the medical profession. Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends. When standard medical options are available, mere convenience does not suffice to displace them; and if some procedures have different risks than others, it does not follow that the State is altogether barred from imposing reasonable regulations. [195]

This is significant in determining the constitutionality of other abortion-related regulations regarding contested medical propositions.[196]

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189. Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278, 296 (2d Cir. 2006). Due to the timing of the opinion, this case was not before the Supreme Court. This omission is unfortunate because the evidentiary record developed in the New York district court, *see* Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436 (S.D.N.Y. 2004), is much more comprehensive than those of the California and Nebraska courts, *see* Planned Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 1019 (N.D. Cal. 2004); Carhart v. Ashcroft, 331 F. Supp. 2d 805, 1011 (Neb. 2004).

190. *See Gonzales*, 127 S. Ct. at 1618.

191. *Id.* at 1639.

192. *Id.* at 1627–28.

193. *Id.* at 1632.

194. *Id.* at 1637. The Court noted,

> Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts . . . .The medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden.

Id. (internal citation omitted).

195. *Id.* at 1638 (internal citations omitted).

196. Examples of such regulation include laws requiring abortion providers to inform women of the possibility that a fetus feels pain after twenty weeks of development, *see* Maggie Datiles, Fetal Pain Legislation: Women Deserve to Know, http://www.culture-of-life.org/content/view/127/98/ (last visited June 3, 2008) (discussing the concept of fetal pain and attempts at fetal pain legislation), or that some

Justice Ginsburg's dissent attacks the majority for its disregard of precedent,[197] its use of evocative language,[198] and its willingness to defer to congressional findings of fact.[199] She accuses the majority of holding an outdated and misogynistic view of women,[200] and of denying the role of abortion in promoting sexual equality.[201] The fact that three Justices joined her in asserting this last point[202] evidences a further shift in the constitutional grounding of abortion rights. What began as a right grounded in the privacy of the patient–physician relationship[203] subsequently became a woman's liberty interest encompassed in the Due Process Clause.[204] To redefine the right as emanating from the Equal Protection Clause of the Fourteenth Amendment would permit heightened scrutiny of all abortion-related regulations,[205] which in turn would probably result in a repudiation of *Casey*'s claim of greater respect for legislative judgments dealing with this deeply divisive issue.[206] Such a future, however, requires the persuasion of at least one additional Justice on the issue of the centrality of abortion to women's equal status in society.

V. PREDICTIONS OF THE FUTURE

Assuming that the current Court's balance on the issue of abortion continues, it seems most likely that there will be gradual contraction of the Court's supervision of abortion legislation and regulation. The *Gonzales* majority's denunciation of facial challenges as the means of testing abortion laws[207] suggests that more state laws will go into effect prior to or concurrent with defense of those laws from

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research supports the conclusion that abortion increases the risk of breast cancer, *see* Abortion-Breast Cancer News Headlines, http://www.abortionbreastcancer.com/news/031216/ (last visited June 3, 2008) (discussing legislation that requires abortion providers to notify patients of the potential link between abortion and breast cancer).

197. *See Gonzales*, 127 S. Ct. at 1641 (Ginsburg, J., dissenting).

198. *See id.* at 1650.

199. *See id.*

200. *See id.* at 1649 ("This way of thinking reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited.").

201. *See id.* at 1641.

202. *See id.* at 1640.

203. *See* Roe v. Wade, 410 U.S. 113, 163 (1973).

204. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

205. *See* United States v. Virginia, 518 U.S. 515, 531 (1996) ("Parties who seek to defend gender-based government action must demonstrate an exceedingly persuasive justification for that action." (internal quotation marks omitted)).

206. *See Casey*, 505 U.S. at 871.

207. *See* 127 S. Ct. at 1638–39. Specifically, the Court noted,

> The considerations we have discussed support our further determination that these facial attacks should not have been entertained in the first instance. In these circumstances the proper means to consider exceptions is by as-applied challenge. The Government has acknowledged that preenforcement, as-applied challenges to the Act can be maintained. This is the proper manner to protect the health of the woman if it can be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used. In an as-applied challenge the nature of the medical risk can be better quantified and balanced than in a facial attack.

Id.

constitutional attacks. This is a major victory for the democratic process, because many abortion laws are never enforced due to plaintiffs' immediate attacks through the courts, which in turn lead government officials to settle to avoid expensive and protracted litigation.[208] This shift to as-applied challenges also suggests that constitutional attacks will require evidence of actual harms that have occurred or are certain to occur, rather than mere speculation that some women will some day experience some problem that might result in an unconstitutional application of the statute.[209]

The *Ayotte* Court's emphasis on narrow relief[210] also foretells greater restraint by courts in cases where the court can sever offending provisions while leaving a majority of the statute intact or where the court can tailor relief to address the particular circumstances in which application of the statute would be unconstitutional. This will allow statutes and regulations to be applied in the common circumstances that were most likely the basis of the legislation, while ensuring that the rare or exceptional circumstances are properly addressed, if and when they arise.

There is also some evidence that the Court will place greater emphasis on the requirements of constitutional and prudential standing prior to adjudicating constitutional claims in this area. At least three federal courts of appeals have rejected facial attacks on abortion-related statutes that contain only civil remedies, because the Government may not be permitted to seek such relief under the terms of the statute,[211] or the Government is at least no more likely to seek such relief than other entities or persons.[212]

Finally, there is some reason to hope that the Court will more skeptically regard abortion providers' claims that they represent the interest of women rather than their own commercial and political interests. While the overturning of *Singleton v. Wulff*[213] does not appear in the offing, Justice Kennedy's recognition that abortion is not uniformly beneficial to women is promising.[214] Notwithstanding Justice Ginsburg's outrage at the suggestion that some women suffer psychological harm from abortions,[215] medical and psychological research is increasingly confirming this to be the case. Women who have had abortions "experience varying degrees of

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208. Almost all challenges to abortion laws filed in federal courts are filed as claims under 42 U.S.C. § 1988, which provides for payment of plaintiff's attorney fees if the suit is successful. However, there is no provision for the payment of the Government's fees if the plaintiff loses. Because these cases often involve plaintiff's lawyers who specialize in the area and state attorneys who have rarely, if ever, defended cases involving abortion, the risks of losing a case are high—independent of the constitutional validity of the statute or regulation. In some cases, this problem is further compounded by the defending attorneys having a preexisting political commitment to maintaining abortion rights, which has been a basis of their campaign for public office. For an example of a case dealing with abortion challenges and attorney fees under § 1988, see Diamond v. Charles, 476 U.S. 54 (1986).

209. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 180–88 (2000) (discussing the constitutional requirements for standing).

210. *See* Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 330–31 (2006).

211. *See* Okpalobi v. Foster, 244 F.3d 405, 426–27 (5th Cir. 2001); Hope Clinic v. Ryan, 195 F.3d 857, 875–76 (7th Cir. 1999), *vacated on other grounds*, 530 U.S. 1271 (2000); Summit Med. Assocs., P.C. v. Pryor, 180 F.3d 1326, 1341–42 (11th Cir. 1999).

212. *See* Nova Health Sys. v. Gandy, 416 F.3d 1149, 1155–58 (10th Cir. 2005).

213. 428 U.S. 106 (1976).

214. *See* Gonzales v. Carhart, 127 S. Ct. 1610, 1634 (2007).

215. *See id.* at 1648–49 (Ginsburg, J., dissenting).

emotional distress"[216] and are more likely to exhibit self-destructive behaviors.[217] Several studies have shown surprising, increased rates of suicide following abortion.[218] This phenomena is not seen after miscarriage.[219]

VI. CONCLUSION

Each of these possibilities—limiting facial attacks on abortion laws, narrow crafting of remedies for unconstitutional provisions, increased emphasis on the requirements of constitutional and prudential standing, and greater skepticism regarding abortion providers' claims of representing the interests of women—bodes well for the political health of this country. If the Court embraces these positions, collective self-governance over the difficult and divisive question of abortion will largely be restored. But these steps, while important and worthwhile, will not afford protection for the most vulnerable among us—the unborn. To do that, the Court would have to reverse *Roe* outright, either on the basis that the Constitution does not limit the ability of states to prohibit abortion or on the basis that the unborn are persons within the protection of the Constitution. At this time, it appears unlikely that Chief Justice Roberts or Justice Kennedy would supply the necessary fifth vote to reverse *Roe*, and there is no evidence that any Justice is willing to assert the constitutional personhood of the unborn.[220]

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216. ELIZABETH RING-CASSIDY & IAN GENTLES, WOMEN'S HEALTH AFTER ABORTION: THE MEDICAL AND PSYCHOLOGICAL EVIDENCE 131 (2d ed. 2003); *see also* Anna Glasier, *Counseling for Abortion*, *in* MODERN METHODS OF INDUCING ABORTION 112, 117 (David T. Baird et al. eds., 1995) ("For most women, abortion is emotionally painful."); Jo Ann Rosenfeld, *Emotional Responses to Therapeutic Abortion*, 45 AM. FAM. PHYSICIAN 137, 137–38 (1992) (discussing the complicated emotional response of women and their families to therapeutic abortions). Additional sources are collected and discussed in Thomas R. Eller, *Informed Consent Civil Actions for Post-Abortion Psychological Trauma*, 71 NOTRE DAME L. REV. 639 (1996).

217. RING-CASSIDY & GENTLES, *supra* note 216, at 189 ("Post-abortion behaviors tend to be self-destructive and include suicide, both actual and attempted; deliberate self-harm such as mutilation and other punishments; unconscious self-harm in the form of substance abuse, smoking, and various eating disorders; and unstable, often abusive and battering, relationships. . . . [T]he suicide rate following abortion is six times greater than that following childbirth, and three times the general suicide rate . . . ."); *see also* Henry P. David et al., *Postpartum and Postabortion Psychotic Reactions*, 13 FAM. PLAN. PERSP. 88 (1981) (analyzing the psychological effects of abortion); Mika Gissler et al., *Suicides After Pregnancy in Finland, 1987–94: Register Linkage Study*, 313 BRIT. MED. J. 1431, 1433 (1996) (discussing the high rate of post-abortion suicides in Finland).

218. *See, e.g.*, John M. Thorp, Jr. et al., *Long-Term Physical and Psychological Health Consequences of Induced Abortion: Review of the Evidence*, 58 OBSTETRICAL & GYNECOLOGICAL SURV. 67 (2003) (showing that American women who had abortions were 2.5 times more likely to die of suicide). A Finnish study showed that women who had abortions were 3.1 times more likely to die from suicide than nonpregnant women, and 6.0 times more likely to die from suicide than women who completed their pregnancy. *See* Gissler et al., *supra* note 217, at 1433. In England, psychiatric hospital admissions because of suicide attempts are almost three times more likely for women after induced abortion. *See* Christopher L. Morgan et al., *Suicides After Pregnancy*, 314 BRIT. MED. J. 902, 902 (1997). A survey of Minnesota high school students found that adolescent girls were ten times more likely to attempt suicide in the six months after an abortion than adolescents who did not have abortions. B. GARFINKEL ET AL., STRESS, DEPRESSION AND SUICIDE: A STUDY OF ADOLESCENTS IN MINNESOTA, RESPONDING TO HIGH RISK YOUTH 43–55 (1986).

219. Thorp et al., *supra* note 218, at 74 (miscarriage referred to medically as "spontaneous abortion").

220. *See* Schlueter & Bork, *supra* note 52.

For those of us who believe that abortion is "nothing short of an act of violence against innocent human life,"[221] this prognosis is hopeful, but not joyful. We must continue the difficult work of persuading our families, friends, and neighbors that the value of each human life arises from the fact that the life is human, not from the fact that the creation of that life is planned or wanted by others. We must pass legislation that affords all the protections of parents and their unborn children permitted under the Court's interpretation of the Constitution. We must then pass legislation that exceeds that interpretation to challenge the Court to allow greater protections. We must elect public officials that will take serious their obligation to defend these laws, notwithstanding the appearance of overwhelming strength on the side of those who demand that abortion remain legal. Finally, we must anticipate and combat the new threats to human life and dignity arising from unbridled scientific experimentation, so that fifty years from now we are not fighting similar battles over new monstrous practices that allow for the taking or distorting of human life. Winning these battles in the legal arena will require far more than skilled advocates and modest judges. It will require men and women who are committed to the idea that justice requires recognition and protection of the innate value of *every* human being.

221. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

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